BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH W. SMITH Claimant	)	
VS.	)	
HY-VEE FOOD STORES Respondent	)	Docket No. 1,045,672
AND	)	
EMCASCO INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 24, 2010, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 8, 2011. Steven J. Borel, of Olathe, Kansas, appeared for claimant. Thomas Clinkenbeard, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a 7.5 percent functional impairment. The ALJ further found the claimant was entitled to a work disability. The ALJ determined that claimant had a task loss of 47 percent and a wage loss of 100 percent, which calculated to a work disability of 73.5 percent to begin April 26, 2010. He concluded that respondent had failed to establish that claimant had a preexisting rateable permanent functional impairment and, therefore, denied any credit for preexisting impairment. The ALJ also found that claimant was entitled to an additional three weeks of temporary total disability compensation.

The Board has considered the record and adopted the stipulations listed in the Award. The Board has also reviewed and considered the Affidavit of Sandra Perkins, which was made a part of the record per stipulation of the parties. During oral argument to the Board, the parties agreed that the ALJ's findings concerning claimant's percentage of functional impairment and percentage of task loss are not in dispute.

ISSUES

Respondent requests review of the ALJ's finding that claimant is entitled to work disability. Respondent contends that even considering *Bergstrom*[1] and *Tyler*[2], claimant is not entitled to a work disability because he voluntarily left his employment. Respondent argues that to find otherwise would lead to an unreasonable result and would be against public policy. Respondent asserts that at most, claimant should be limited to his functional impairment.

Claimant argues that under *Bergstrom*, he is entitled to work disability because "K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek post-injury employment to mitigate the employer's liability."[3] Claimant also contends that in any event, he had good cause not to accept a job as a night checker for respondent because of a traumatic event that occurred in his past.

The issue for the Board's review is: Is claimant disqualified for compensation under the theory of work disability because he voluntarily terminated his job with respondent?

FINDINGS OF FACT

Claimant began working for respondent on September 16, 2008, as a stocker during the night shift. The job required him to open boxes, place product on shelves, and face product on shelves to make it more presentable and reachable. On January 30, 2009, claimant was on his knees, bent down, and reaching to the back of a shelf to retrieve stock and pull it to the front when he felt stinging in his neck and shoulder area and tightness in his low back. The stinging in his neck and shoulders was temporary, but the low back condition began to progress and worsen. Claimant said he was having a severe spasm in the low left side of his back that went down into his left leg. Claimant reported his injury within a day of when it occurred.

Respondent provided treatment with Dr. Michael Geist. Dr. Geist put claimant on medication and prescribed physical therapy. Claimant said he was off work for a few weeks and then went back to work at light duty on a graduating system, returning first 2 hours a day, then 4 hours a day, and then was upgraded to 6 hours a day. An MRI was done on March 13, 2009, which revealed multilevel degenerative disc and facet disease and a bulging disc to the left at L3-4. Dr. Geist also gave him two epidural injections, one in May and one in June 2009. In June 2009, he modified claimant's lifting restriction up to

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[1] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[2] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[3] *Bergstrom*, 289 Kan. at 680.

25 pounds. In August 2009, he sent claimant for a surgical consultation. He did not see claimant again until March 2010.

Claimant testified he continued to experience tightness and spasms in his left low back when he would get out of bed. However, on March 3, 2010, he had a severe spasm with severe pain. He tried to see Dr. Geist that day, but was unable to get in until March 8, 2010. Dr. Geist again put claimant on pain medication and anti-inflammatories. Claimant was given a slip with a 5 to 10 pound lifting restriction, which he gave to Twilla Brown, respondent's human resources director. He was off work until March 24, when he received a call from the night shift manager saying respondent had work he could perform within his restrictions. However, he was not working a full 8-hour shift. As of April 7, 2010, his lifting restriction was raised to 15 pounds and he was able to work for 6 hours per day. His hours were raised to 8 hours per day by Dr. Geist on April 15, but the 15-pound lifting restriction was retained. Dr. Geist, however, stated that the 15-pound restriction was not intended to be permanent.

Dr. Geist was asked about the possibility of claimant working at respondent as a back-up checker. He reviewed the position description for a night stocker and for a checker/stocker position. He agreed the checker/stocker would be a lighter position than just the stocker position. He said in his opinion, a change to a checker/stocker position would be protective of claimant's health. He said someone who was having back pain and degenerative changes should be encouraged to make a shift to a lighter position. However, after being given a history of claimant's robbery experience, Dr. Geist said that from a psychological perspective, he could see why claimant would not want to do the checker position.

Mike Clark is night stock manager at respondent and was claimant's supervisor. He testified that claimant had expressed an interest in working a 40-hour week schedule, but respondent was unable to provide him with 40 hours within his restrictions at his position as a night stock clerk. On April 20, 2010, after meeting with Ms. Brown, the human resources director, and Andrew Yochum, the store director, Mr. Clark told claimant that in order to get him up to 40 hours within his restrictions, he would need to be trained to be a checker. Claimant told him he did not want to be a checker. Mr. Clark said that later, claimant came up to his office, gave him several reasons for not wanting to be a checker, and then left the store. Claimant did not appear at work on either April 21 or 22, although he was on the schedule. Ms. Brown received a call from claimant asking about being trained as a checker, and she scheduled an appointment for him to meet with her and Mr. Yochum on April 23.

Both Ms. Brown and Mr. Yochum testified about the meeting with claimant on April 23. Both said claimant was told the checker position would not be full time and that his primary duties would still be as a stocker. Claimant was told he would be a back-up checker, and there would be a primary checker scheduled at the same time. Both Ms. Brown and Mr. Yochum said claimant gave them several reasons why he did not want to

be a checker, including that he would hurt his condition more, that he would have to lift heavier items if he was a checker, that checking was not what he was hired to do, and that he did not want to be a checker. Toward the end of the meeting, claimant mentioned he did not want to be a checker because a number of years earlier he had been the victim of an armed robbery while working at a cash register. Nevertheless, claimant was told that he would have to be trained as a checker.

Ms. Brown, Mr. Yochum and Mr. Clark all said the checking duties would consist of no more than 30 percent of claimant's time. The rest of the shift claimant would stock and face items that weighed less than 15 pounds.

On April 27, 2010, 30 minutes before claimant was scheduled to begin training on the cash register, claimant called Ms. Brown and told her he did not want to be a cashier. Claimant did not go to work that day, nor did he go to work the next day, April 28. Claimant testified his last day of work was April 25, which carried over into April 26.

George Smith is claimant's brother. He and four of his brothers, including claimant, owned several gas stations. In 1977, there was an armed robbery at a gas station where claimant was working. Claimant was forced to turn over to the robbers the key to the station's safe. Mr. Smith said that claimant was then taped up, taken to the back room and handcuffed to a support pole in the bay area. His mouth and eyes had been duct taped shut, and there was duct tape around his hands. After that incident, claimant refused to be responsible for the key to the safe or operate any of their gas stations.

Dr. Peter Bieri is board certified in disability evaluation. He examined claimant on two occasions, both at the request of claimant's attorney. He first examined claimant on November 24, 2009. Claimant gave him a history of experiencing pain in his neck and low back while bending and lifting at work on January 30, 2009. Claimant complained of persistent low back pain that radiated into his left lower extremity to the level of the knee. Upon examination, Dr. Bieri found claimant had some reduction in range of motion, a positive straight leg raising test, and a slight decrease in sensation along the lateral aspect of the left thigh to the level of the knee. Dr. Bieri said claimant had findings of disk disease at multiple levels as well as clinical radiculopathy. Based on the AMA *Guides*,[4] he found that claimant was in DRE Lumbosacral Category III for a 10 percent permanent partial impairment to the whole body. Dr. Bieri noted that claimant was working full-time within pain tolerance with no formal restrictions, which he opined was reasonable and appropriate.

Claimant was seen by Dr. Bieri a second time on June 29, 2010. Claimant reported that in March 2010, he had a flare-up of his symptoms and underwent some additional

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

treatment of medication and physical therapy and had been given a lifting restriction of 5 to 10 pounds by Dr. Geist. Claimant also told Dr. Bieri that he had ended his employment on April 25, 2010. The results of Dr. Bieri's physical examination of claimant were essentially unchanged, and Dr. Bieri opined that claimant's impairment rating of 10 percent also remained unchanged.

Dr. Bieri recommended that claimant limit occasional lifting to 25 pounds, frequent lifting not to exceed 20 pounds, and constant lifting not to exceed 10 pounds. Dr. Bieri also recommended that repetitive bending, twisting and stooping should be performed no more than occasionally to frequently. He reviewed a task list prepared by Mary Titterington. Of the 30 tasks on the list, he opined that claimant was unable to perform 15, for a 50 percent task loss.

Dr. Bieri, in noting claimant's relapse in March 2010, said that it would be medically reasonable for the respondent to consider whether claimant might be reassigned to a less physically strenuous job. He said if the less strenuous job fit within the restrictions, it would be in claimant's best interests. He also said he could understand claimant not being willing to work as a checker after having gone through the trauma of being a victim of armed robbery in the past.

Dr. Joseph Huston, an orthopedic surgeon, is board certified as a disability evaluator. On May 25, 2010, he examined claimant at the request of the ALJ. He took a history from claimant and reviewed his medical records and the MRI film done on March 13, 2009.

In his physical examination of claimant, Dr. Huston did not obtain either Achilles reflex. He also found that claimant had some decreased pinprick sensation on the left lateral leg and top of his foot. Everything else was close to normal. Dr. Huston opined that as a result of the January 30, 2009, accident, claimant had a lumbar strain and aggravation of preexisting degenerative disc disease that includes left lower extremity radiculopathy on a mild and intermittent basis. Based on the AMA *Guides*, Dr. Huston rated claimant as having a 5 percent permanent partial impairment to his whole person. Dr. Huston also believed 2 percent of the 5 percent impairment was due to preexisting problems in claimant's spine.

Dr. Huston said that claimant should not lift over 25 pounds. He reviewed Ms. Titterington's task list, and of the 30 items on that list, he opined that claimant was unable to perform 13 for a 43 percent task loss. He said that if respondent was trying to find a job that was even lighter than what claimant was doing, he would have no medical disagreement with that.

Mary Titterington, a vocational rehabilitation counselor, interviewed claimant on June 9, 2010, at the request of claimant's attorney. She prepared a list of 30 tasks claimant had performed in the 15 year period before his injury. At the time she met with

claimant, he was not working and had a 100 percent wage loss. Ms. Titterington said she was familiar with the job of a checker in a grocery store and opined that claimant would be unable to perform that job within the restrictions established by Dr. Bieri, since a checker job involves almost constant twisting.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,[5] the Kansas Supreme Court, in overturning the requirement that a claimant must make a good-faith effort to find alternate employment after an injury, stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should

[5] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

> or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
>
> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

In *Tyler*,[6] the Kansas Court of Appeals stated: "Our Supreme Court's direction in *Bergstrom* could not be clearer. Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement."

In *Osborn*,[7] the Court of Appeals reversed the Board's imputing of a post-injury wage where it was determined the claimant failed to make a good-faith job search. Respondent argued the case was factually distinguishable from *Bergstrom* because the claimant in *Bergstrom* was directed to stop working by a physician whereas the claimant in *Osborn* voluntarily quit an accommodated job. Further, the respondent argued there must be a causal connection between the wage loss and the injury. The Court of Appeals rejected both arguments, noting there is nothing in K.S.A. 44-510e that permits the factfinder to impute a wage. Citing *Bergstrom* and *Tyler*, the Court of Appeals reiterated that there is no requirement for a claimant to prove a causal connection between the injury and the job loss.[8]

ANALYSIS

Respondent contends that the *Bergstrom* and *Tyler* decisions are contrary to public policy and to the legislative intent of the Workers Compensation Act. Respondent further argues that those decisions should be distinguished from this case because the claimant herein voluntarily quit his accommodated employment with respondent. Claimant disputes that the accommodated job was appropriate and further argues that claimant had good cause for refusing the check out position. Nevertheless, the Board believes that the Kansas appellate courts have spoken on this good faith issue and, as such, the reasons for claimant's wage loss are not relevant to the determination of work disability under K.S.A. 44-510e. A wage will not be imputed to claimant. Likewise, claimant will not be limited to his percentage of functional impairment after he was terminated from his

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[6] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

[7] *Osborn v. U.S.D. 450*, 2010 WL 4977119, Kansas Court of Appeals unpublished opinion filed November 12, 2010 (No. 102,674).

[8] See also *Guzman v. Dold Foods, LLC.*, 2010 WL 1253714, Kansas Court of Appeals unpublished opinion filed March 26, 2010 (No. 102,139).

employment with respondent. The ALJ's finding that claimant has a 100 percent wage loss and is entitled to an award of permanent partial disability compensation based on work disability is affirmed.

CONCLUSION

Claimant is not disqualified from an award based on work disability (the average of his actual wage loss percentage and his percentage of task loss) by reason of the circumstances surrounding his termination from an accommodated job with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 24, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Steven J. Borel, Attorney for Claimant
Thomas Clinkenbeard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge